[filed 04-23-93]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. CR-92-90-R
	:	
JAMES F. WOODS;	:	Judge Jackson L. Kiser
JAMES L. GARNER, SR.; and	:	
EDGAR J. DOBBINS,	:	
	:	
Defendants.	:	

RESPONSE OF THE UNITED STATES TO DEFENDANT DOBBINS' MOTION TO DISMISS THE INDICTMENT AS BEYOND THE STATUTE OF LIMITATIONS AND FOR A MISJOINDER OF DEFENDANTS AND ACTS AND FAILING TO ALLEGE A VIOLATION OF 15 U.S.C. § 1

I

INTRODUCTION

An Indictment charging Defendant Dobbins with participating in a conspiracy to violate Section One of the Sherman Act was filed on June 24, 1992. Defendant Dobbins has moved to dismiss the Indictment.[1] For the reasons discussed in this Response, Defendant Dobbins' Motion should be denied.[2]

[1]Although Defendant Dobbins' Motion is dated April 13, 1993, the United States did not receive it until April 19, 1993.

[2]Based on the United States' understanding of the "Stipulated Order Establishing Schedule for Pretrial Matters," Defendant Dobbins' Motion is untimely. The United States is not, however, advocating dismissal of his Motion on the basis of its untimeliness.

Defendant Dobbins bases his argument for dismissal upon two theories. First, he argues that the Indictment should be dismissed because it improperly joins the Defendants. Specifically, Defendant Dobbins argues that the Defendants did not conspire with each other. Consequently, there were three separate and distinct conspiracies. Second, Defendant Dobbins argues that the Indictment improperly charges him with a single conspiracy. He claims that there were two separate and distinct conspiracies: one to fix wholesale prices to commercial customers and another to rig school bids. Once the charged conspiracy is separated into two conspiracies, Defendant Dobbins argues that the statute of limitations bars prosecution for his involvement in the wholesale conspiracy, and lack of proof of an agreement requires dismissal of any charge against him for participation in a conspiracy to rig school bids.[3]

[3]Defendant Dobbins has also moved the Court to dismiss the Indictment for "Misjoinder of Courts [sic]." Defendant Dobbins briefly mentions this claim on page 5 of the Memorandum accompanying his Motion. He argues that the Indictment should have contained two counts and it should be dismissed because it contains only one count. The propriety of the Indictment is discussed in full later in this Memorandum. If Defendant Dobbins intended to move the Court to dismiss the Indictment on the basis of misjoinder of counts, his Motion is inappropriate since the Indictment in this case charges only one count.

II

THE DEFENDANTS ARE PROPERLY JOINED

A. Severance, Not Dismissal, Is The Appropriate Remedy For Misjoinder, But Defendant Dobbins Has Failed To Show Misjoinder

Defendant Dobbins contends that the Indictment should be dismissed because the Indictment and the Voluntary Bill of Particulars indicate there are at least three separate and distinct conspiracies. (Defendant Dobbins argues that each of the three Defendants were involved in separate price-fixing and bid-rigging conspiracies.) The appropriate remedy to be sought by a defendant for prejudicial misjoinder of defendants is severance, not dismissal. United States v. Campbell Hardware Inc., 470 F.Supp. 430, 435-36 (D. Mass. 1979); United States v. Connelly, 129 F.Supp. 786 (D.C. Minn. 1955).[4] Since the pleadings on their face allege one conspiracy and Defendant Dobbins has failed to assert any prejudice resulting from his joinder, he is not entitled to severance.

At the pre-trial stage, the issue of misjoinder is limited to determining what the Indictment charges as a matter of law. United States v. Berlin, 707 F.Supp. 832, 837 (E.D. Va. 1989). See United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977); United States v. Campbell Hardware Inc., 470 F.Supp. at 436. Examining the face of the Indictment, the Defendants are properly joined under Rule 8 of the Federal Rules of Criminal Procedure.

[4]This Court has previously denied Defendant Garner's Motion for Severance, which also alleged that there were three separate conspiracies.

Rule 8(b) permits the joinder of defendants if "[the defendants] are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). In the instant case, the Indictment charges a single conspiracy involving all three Defendants. "[T]he defendants and co-conspirators engaged in a combination and conspiracy to suppress and eliminate competition by fixing prices and rigging bids on milk and other dairy products in western Virginia and southern West Virginia." Indictment, pages 1-2. In addition, the Indictment charges that the "combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators." Indictment, page 2. Since the Indictment, on its face, alleges facts that support a finding of one conspiracy, Defendant Dobbins' argument that each of the Defendants should have been charged with a separate conspiracy is insupportable. United States v. Berlin, 707 F.Supp. at 837; United States v. Campbell Hardware, 470 F.Supp. at 435-36.

Defendant Dobbins fails to illustrate how the Indictment requires a finding that the Defendants have been improperly joined. Instead, he bases his argument for misjoinder on the inaccurate assertion that the meetings held between Paul French and each Defendant, as described in the Voluntary Bill of Particulars, contained no reference to the other Defendants. Defendant Dobbins' Memorandum, page 2. Defendant Dobbins,

however, specifically mentioned Defendant Woods when Defendant Dobbins met with Paul French during the summer of 1986:

> In the course of the conversation, Dobbins told French that Woods was upset about Valley Rich's servicing of several local area Hardee's accounts and that Woods wanted Dobbins to retaliate against Valley Rich by taking the Covington City school system. Dobbins then told French that Dobbins was going to try to talk Woods out of retaliating against Valley Rich.

Voluntary Bill of Particulars, page 7.

Defendant Dobbins also argues for misjoinder on the basis that the United States has failed to allege any meetings or conversations among the three Defendants. The absence of direct communication among defendants does not require severance where, as here, a "general interrelationship among defendants is shown." United States v. Campbell Hardware, 470 F.Supp. at 436. See also, United States v. Jones, 578 F.2d 1332 (10th Cir. 1978), cert. denied, 439 U.S. 913 (1979). Defendant Dobbins' relationship with Defendant Woods is evidenced by his statements to Paul French at the meeting held during the summer of 1986. Furthermore, a relationship among the Defendants has been established through their common coconspirator, Paul French. Finally, a general interrelationship among the Defendants is evidenced by their common employment relationship with Meadow Gold Dairies, Inc., and more specifically by the fact that Defendant Woods had supervisory authority over the plants managed by Defendant Dobbins and Defendant Garner. See Indictment, page 5.

B. Defendant Dobbins Has Failed To Demonstrate Actual Prejudice Resulting From His Joinder For Trial

Defendant Dobbins has failed to make a showing of prejudice resulting from his joinder, and is therefore precluded from severance. Absent exceptional circumstances, persons indicted together should be tried together. United States v. Pryba, 900 F.2d 748, 758 (4th Cir.), cert. denied, 498 U.S. 924 (1990). United States v. Brugman, 655 F.2d 540, 542 (4th Cir. 1981). A presumption in favor of joinder arises when a defendant is charged with a conspiracy. United States v. Steinhorn, 739 F.Supp. 268, 275 (D. Md. 1990). See United States v. Spitler, 800 F.2d 1267, 1271 (4th Cir. 1986). Under Rule 14 of the Federal Rules of Criminal Procedure, the decision to grant or deny severance lies within the sound discretion of the trial court, and its decision "will not be overturned unless the defendant affirmatively demonstrates a clear abuse of discretion through having been deprived a fair trial and having suffered a miscarriage of justice." United States v. Spitler, 800 F.2d at 1271-72; United States v. Becker, 585 F.2d 703, 706 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979). In making its determination, the "trial court must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants . . . ." United States v. Becker, 585 F.2d at 706.

Moreover, to be entitled to a severance under Rule 14, a defendant must show more than "merely that a separate trial would offer him a better chance of acquittal." United States v.

Spitler, 800 F.2d at 1271 (quoting United States v. Parodi, 703 F.2d 768, 780 (4th Cir. 1983)). Rather, a defendant must show actual prejudice resulting from his being joined for trial with his codefendants. United States v. Clark, 928 F.2d 639, 644 (4th Cir. 1991). Indeed, a defendant seeking severance "must show that a joint trial would have been so prejudicial as to have resulted in a miscarriage of justice." United States v. Pryba, 900 F.2d at 758; United States v. Brugman, 655 F.2d at 543.

Defendant Dobbins has failed to make any showing of prejudice. Accordingly, the Defendants have been properly joined and should be tried together.

III

THE INDICTMENT PROPERLY CHARGES ONE CONSPIRACY

In support of dismissal, Defendant Dobbins essentially argues that the United States has improperly charged two conspiracies in a single count. He claims that the agreement to fix prices charged to commercial accounts was a separate and distinct conspiracy from the conspiracy to rig school bids. Presumptuously assuming that the Court will separate the charged conspiracy into multiple conspiracies, Defendant Dobbins argues that the statute of limitations bars prosecution for his involvement in the wholesale conspiracy. Further presuming that the Court will find that two distinct conspiracies existed, Defendant Dobbins then argues for the dismissal of any charge against him relating to the rigging of school bids on the basis

that the United States has failed to prove an agreement.[5] Defendant Dobbins' Motion to Dismiss should be denied because the Indictment properly charges a single conspiracy occurring within the limitations period.

A. The Wholesale Price-Fixing And The School Bid-Rigging Constitute One Conspiracy

It is true that an indictment cannot charge two separate conspiracies in one count, Kotteakos v. United States, 328 U.S. 750 (1946), but the question as to how many conspiracies exist is one for the jury. United States v. Urbanik, 801 F.2d 692, 695 (4th Cir. 1986); United States v. Berlin, 707 F.Supp. 832, 837 (1989). The court may only intervene at the pre-trial stage if the indictment on its face would fail to permit the government to prove a set of facts supporting the notion of a single conspiracy. United States v. Berlin, 707 F.Supp. at 837. The Fourth Circuit has held that "[w]hether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals." United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988). In addition, factors contributing

[5]After separating the charged conspiracy into two distinct conspiracies, Defendant Dobbins cites to the Voluntary Bill of Particulars and argues that his meetings with Paul French constituted attempts to rig school bids, rather than actual agreements in violation of the Sherman Act. Assuming arguendo that the rigging of school bids was a separate conspiracy, an alternative interpretation of what transpired at the meetings is that Defendant Dobbins was attempting to modify a pre-existing agreement with Paul French. Even if there was a separate conspiracy to rig school bids, the question of whether Defendant Dobbins agreed to rig bids is certainly one for the jury to answer and would, therefore, be inappropriate for pre-trial determination.

to a finding of one conspiracy include similarity of the geographic area and products involved. United States v. Crockett, 813 F.2d 1310, 1316-17 (4th Cir.), cert. denied, 484 U.S. 834 (1987).

The Indictment in this case permits the United States to prove a set of facts consistent with a finding of a single conspiracy. In fact, the Voluntary Bill of Particulars and the Indictment already reveal significant overlap in the actors, methods, and goals of the wholesale pricing arrangements and the school bid-rigging activities. For example, the actors who engaged in price fixing and bid rigging were the same. Namely, Defendant Dobbins, Defendant Woods and Defendant Garner each discussed school bids and wholesale pricing with Paul French. In addition, the companies involved -- Meadow Gold Dairies, Inc. and Valley Rich Dairy -- were identical. The methods were also the same inasmuch as the bid rigging and price fixing was done through discussions, meetings, and telephone calls. Furthermore, the products and the geographic market involved were the same. Finally, the goals of the price fixing and the bid rigging were identical: the elimination of competition for milk and related dairy products in portions of Virginia and portions of West Virginia. The actors, methods, and goals overlap to great degree. The Indictment in no way prevents the United States from proving at trial that one conspiracy existed.

B. The Indictment Charges A Single Conspiracy Within the Limitations Period

The Defendants in this case were indicted within the limitations period. The Indictment alleged a conspiracy "continuing at least until July 30, 1987." Indictment, page 1. The Indictment was returned on June 24, 1992, which is within the limitations period.[6] Furthermore, the Indictment charges that part of the conspiracy included an agreement "to have the defendants and co-conspirators request and accept payments for milk and other dairy products sold to schools based on the collusive, noncompetitive and rigged bids." Indictment, page 2. The Indictment also charges that in furtherance of the conspiracy, the defendants "requested and accepted payments for milk and other dairy products sold to schools based on the collusive, noncompetitive and rigged bids." Indictment, page 4. The "Response of The United States To Motions Of Defendants James F. Woods And Edgar J. Dobbins For a Bill of Particulars," page 14, states that the conspirators received payments pursuant to the conspiracy at least as late as July 30, 1987. Where a Sherman Act conspiracy includes an agreement to accept payment, the conspiracy is not complete -- and the statute of limitations does not begin to run -- until receipt of the last payment. United States v. A-A-A Electrical Company, Inc., 788 F.2d 242,

[6]See "Memorandum of United States In Opposition To Defendant Woods' Motion To Dismiss Indictment As Beyond The Statute of Limitations," which was sent to the Court by letter, dated February 24, 1993, for a detailed discussion of the statute of limitations issue.

245 (4th Cir. 1986). See also United States v. Modern Electric Co., 788 F.2d 232 (4th Cir. 1986).

IV

CONCLUSION

For the foregoing reasons, Defendant Dobbins' Motion to Dismiss should be denied.

Respectfully submitted,

"/s/"

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